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REVIEWS.

AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION: Being a Commentary on Parts of the Constitution of the United States. By Brinton Coxe, of the Bar of Philadelphia. Philadelphia: Kay & Brother. 1893. Octavo, pp. xvi, 415.

This important contribution to a vitally important subject is a posthumous fragment from the hand of the lamented translator of Güterbock's "Bracton, and His Relation to the Roman Law," — published in 1866. It is edited by Mr. William M. Meigs, of the Philadelphia Bar, a writer favorably known to the profession and to students of constitutional law by various publications, especially an article on "The Relation of the Judiciary to the Constitution," in the nineteenth volume of the *American Law Review*, p. 175, containing the most thorough and trustworthy account of our early constitutional decisions which is to be found anywhere.

Mr. Meigs explains in a preliminary note that what is now published is but the first part of what Mr. Coxe planned. It is a historical introduction or commentary, and was to be followed by a "Textual Commentary." The first part was left by its author electrotyped; we have it, therefore, presumably as he meant it finally to stand. The second part is too incomplete for publication. This is much to be regretted, for the author himself tells us (p. 47) that "it is the most important part of the work, and the one to which the other parts lead up." The editor, however, gives an outline of this second part in his "Note." The main proposition of it is that the Constitution of the United States *expressly* gives to the courts the power of disregarding unconstitutional Acts of the legislature. To some this will seem no new suggestion; it is common to say this, — and to found it upon the second clause of article six. But Mr. Coxe recognizes, what is overlooked by most persons, that this clause, taken alone, and taken only in its *obvious* meaning, relates merely to the control of the courts over State action. In order to make out his point, he ties together this and the second section of article three, — the one making the judicial power of the United States extend to all cases arising under the Constitution and laws of the Union. Without undertaking here either to state fully or to controvert Mr. Coxe's argument as to this, his main point, it may be doubted whether he has established it. That the Constitution in terms gives to the State and Federal judiciary the power to apply the Federal Constitution as law controlling State legislation, must be admitted; that it is matter of just inference to hold a like view as regards Federal legislation, is also well made out. But it may reasonably be thought that the Constitution has not *expressly* given to the judiciary the power to disregard unconstitutional Acts of Congress, and it may be surmised that this express giving of the power was purposely avoided, — as in some other cases, where Madison intimates, and even says in terms, that the Constitution was silent from motives of expediency, of set purpose leaving a given result to be reached by inference and construction.

What appears to us to be the conspicuous merit of this book is its powerful reinforcement of the sound inferential argument for the judicial

power, by a learned and sagacious historical consideration of English, Continental, and colonial precedents. Mr. Coxe fully admits the fact that at the period when our constitutions were made, the theory of parliamentary omnipotence was well established. But he points out that this had not always been so; and the older precedents, relating to the Church and the royal prerogative, show that English law had once been no stranger to the doctrine that an Act of the highest legislature might be judicially held invalid.

In considering the great colonial case of *Winthrop v. Lechmere*, it appears to us that Mr. Coxe abandons quite too readily the view that it involved a *judicial* declaration of the invalidity of the colonial Act. But there is not space to give the reasons for that opinion.

The author deserves thanks for pointing out the bad inaccuracy of the reporter's list of "cases in which the Supreme Court has decided Acts of Congress to be unconstitutional," given in Part A of the Appendix to volume 131 of the United States Supreme Court Reports. In speaking of the omissions in the list, Mr. Coxe remarks that of the *Dred Scott* case. There are reasons for omitting that case to which he does not advert, but there was at least as much reason for inserting it as in the case of two or three others that are there.

Mr. Coxe is sometimes whimsical, and sometimes his comments are hardly those of a lawyer; his style of expression is here and there quite eccentric, and he repeats himself; he is sometimes guilty of squeezing his grapes too hard; and sometimes he gives his reader too little credit for intelligence, and spins out his exposition too much. But the book is still the work of a man of extraordinary intelligence, learning, accuracy, and thoroughness, — a helpful and illuminating book, — and it will be received with grateful appreciation by careful students of constitutional history and law.

J. B. T.

DIGEST XLVII., 2. DE FURTIS. WITH TRANSLATION AND NOTES BY C. H. MONRO, M. A., Cambridge, England: University Press. 1893. 12mo, pp. vii, 128.

The text, translation, and notes, in distinctive type run together on the pages, each comprising about a third of the book. The attempt is to present the sources as such to students, so that many doubts are left unsolved and most words of art left untranslated, rather than that the translator should do the students' work, or destroy by translation the connotation of words which have no accurate English equivalent. The notes give references to other sources and other parts of the Digest.

It is gratifying that the revival of the study of the civil law in England should bring such careful and scholarly work as its latest fruit. Certainly a translation done in this manner of those parts of the Digest which bear by analogy on our modern law would do much towards removing the present lack of interest in this body of famous jurisprudence, which might well furnish the profession with both analogy and argument. This is a good precedent, and will be an example to those who follow it, of the way in which the work should be done.

R. W. H.